

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

Premiere Network Services, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-02-MD-032
	)	
Southwestern Bell Telephone Co.,	)	
	)	
Defendant.	)	

**ORDER**

**Adopted: June 10, 2003**

**Released: June 11, 2003**

By the Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau:

1. In this Order, we grant Complainant Premiere Network Services, Inc.'s ("Premiere") motion to dismiss without prejudice the formal complaint it filed against Defendant Southwestern Bell Telephone Co. ("SWBT").<sup>1</sup> We find that granting Premiere's Motion, in the manner described herein, will ensure the most efficient use of the parties' and the Commission's resources without materially prejudicing SWBT.

**I. BACKGROUND**

2. Premiere filed a formal complaint against SWBT with the Commission on May 24, 2002,<sup>2</sup> following the parties' unsuccessful efforts over an approximately 30-month period to resolve their dispute.<sup>3</sup> Although Premiere's Complaint includes numerous claims, the fundamental issue raised in the complaint is whether SWBT violated the Act and/or Commission rules by failing to route Premiere's "555 numbers" in the manner Premiere requested.<sup>4</sup>

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<sup>1</sup> Complainant's Motion to Dismiss the Proceeding Without Prejudice, File No. EB-02-MD-032 (filed Nov. 27, 2002) ("Motion").

<sup>2</sup> See Complaint, File No. EB-02-MD-032 (filed May 24, 2002) ("Complaint").

<sup>3</sup> The parties generally agree on the procedural background of this proceeding. See Complaint, ¶¶ 24-36, 46-47. See also Defendant's Opposition to Complainant's Motion to Dismiss Without Prejudice, File No. EB-02-MD-032 (filed Dec. 5, 2002) at 2-3.

<sup>4</sup> A "555 number" is a unique line number in the 555 NXX exchange. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration of Second Report and Order and Memorandum Opinion and Order, 14 FCC Rcd 17964, 17997, ¶ 46 (1999).

3. On November 27, 2002, Premiere filed a motion to dismiss its complaint without prejudice.<sup>5</sup> Premiere contends that “SWBT’s representations before the Commission regarding the issue of the availability of 555 service” have damaged “the integrity and accuracy of the record.”<sup>6</sup> Premiere argues that the record developed in this proceeding “is so flawed that the [Commission] will be unable to issue a decision consistent with due process.”<sup>7</sup> Premiere also argues that granting its motion will conserve the parties’ and Commission resources.<sup>8</sup> SWBT filed an opposition to Premiere’s motion on December 5, 2002.<sup>9</sup> SWBT asserts that the Commission should deny Premiere’s request or dismiss the complaint with prejudice.<sup>10</sup> SWBT contends that granting Premiere’s Motion will prejudice SWBT, because it has expended “considerable resources” defending against Premiere’s claims and it “is entitled to a resolution of this dispute.”<sup>11</sup>

## II. DISCUSSION

4. The Commission has broad discretion to conduct complaint proceedings “in a manner that will best conduce to the proper dispatch of business and to the ends of justice.”<sup>12</sup> Although the Commission does not have a specific rule relating to the dismissal of formal complaints, we agree with SWBT that Rule 41(a)(2) of the Federal Rules of Civil Procedure,<sup>13</sup> although not controlling, is instructive.<sup>14</sup> The purpose of Rule 41(a)(2) “is primarily to prevent voluntary dismissals which unfairly affect the other side.”<sup>15</sup> In determining whether to dismiss a

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<sup>5</sup> In addition to seeking dismissal without prejudice, Premiere also requested that the briefing schedule established in the case be extended one week to permit “full consideration” of its Motion. Motion at 5-6. Upon receipt of Premiere’s Motion, Commission staff revised the briefing schedule to extend the deadline for the filing of the parties’ opening briefs by one week. Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, FCC, to Brad E. Mutschelknaus, Counsel for Premiere, and William A. Brown, Counsel for SWBT, File No. EB-02-MD-032 (Nov. 27, 2002). After SWBT filed its Opposition on December 5, 2002, the briefing schedule was suspended pending our decision on Premiere’s Motion. Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, FCC, to Brad E. Mutschelknaus, Counsel for Premiere, and William A. Brown, Counsel for SWBT, File No. EB-02-MD-032 (Dec. 10, 2002).

<sup>6</sup> Motion at 2.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 4 – 5.

<sup>9</sup> Defendant’s Opposition to Complainant’s Motion to Dismiss Without Prejudice, EB-02-MD-032 (filed Dec. 5, 2002) (“Opposition”).

<sup>10</sup> Opposition at 1-2.

<sup>11</sup> *Id.* at 2-3.

<sup>12</sup> 47 U.S.C. §§ 4(i), (j).

<sup>13</sup> FED. R. CIV. P. 41(a)(2) (providing a court with discretion to dismiss an action at the plaintiff’s request upon such terms and conditions as the court deems proper).

<sup>14</sup> Opposition at 5.

<sup>15</sup> Wright & Miller, Federal Practice & Procedure: Civil 2d § 2364 (citing cases).

complaint, courts generally follow the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit.<sup>16</sup> The grant or denial of a motion to dismiss under Rule 41(a)(2) is within the sound discretion of the trial court, and its order is reviewable only for abuse of that discretion.<sup>17</sup>

5. In this instance, we conclude, as explained below, that dismissal without prejudice is appropriate, because dismissal will conserve the parties' and the Commission's resources and SWBT has failed to demonstrate any plain legal prejudice arising from such dismissal.<sup>18</sup>

6. As an initial matter, we reject Premiere's contention that the record in this proceeding is "so flawed" as to impede the Commission's ability "to issue a decision consistent with due process."<sup>19</sup> Premiere points to alleged discrepancies it found between certain factual information detailed in SWBT's Amended Answer with information contained in documents SWBT voluntarily produced in response to Premiere's document requests. Premiere complains that SWBT represented in its Amended Answer that it routed calls to only two 555 numbers but documents attached to the Amended Answer showed a third 555 number in use.<sup>20</sup> This discrepancy was identified promptly, Commission staff ordered SWBT to take certain steps to correct the record, and SWBT complied.<sup>21</sup> Thus, Premiere's allegations concerning a flawed record are meritless.<sup>22</sup>

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<sup>16</sup> *Id.* Courts generally consider a variety of factors, but do not accord each factor the same weight. *Id.* Rather, the concern that generally weighs most heavily among many courts in making such determinations is whether a dismissal will substantially prejudice the defendant. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> In deciding Premiere's Motion, we considered the parties' oral arguments as well as their written submissions on the matter.

<sup>19</sup> Motion at 3.

<sup>20</sup> See Letter from Brad E. Mutschelknaus, Counsel for Premiere, to William A. Brown, Counsel for SWBT, File No. EB-02-MD-032 (filed Aug. 23, 2002) ("Mutschelknaus Aug. 23rd Letter") at 3-4; Motion at 2.

<sup>21</sup> Commission staff ordered SWBT to correct all incorrect factual statements in its Amended Answer, explain how it previously failed to identify all of its 555 numbers, and identify steps it had taken to ensure that the new submissions Commission staff ordered were complete. Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, FCC, to Brad E. Mutschelknaus, Counsel for Premiere, and William A. Brown, Counsel for SWBT, File No. EB-02-MD-032 (Sept. 9, 2002) ("MDRD Sept. 9<sup>th</sup> Letter"). In addition, the staff ordered SWBT "to submit an affidavit under penalty of perjury executed by the appropriate authorized officer of the corporation, verifying the truth and accuracy of the information in SWBT's second amended answer," and stating that there were "no errors or omissions in its amended answer or other pleadings in this case." *Id.* SWBT complied with this request on September 20, 2002, and stated that, based on a thorough review of its records, it had found one more 555 number in use than the numbers previously identified by SWBT or found by Premiere. See Second Amended Answer, File No. EB-02-MD-032 (filed Sept. 20, 2002); see also Affidavit of James C. Smith and Wayne D. Masters, File No. EB-02-MD-032 (filed Sept. 20, 2002); and Letter from William A. Brown, Counsel for SWBT, to Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, FCC, File No. EB-02-MD-032 (filed Sept. 20, 2002) at 1. Premiere was permitted to file a supplemental reply and seek additional discovery addressing any new factual or legal issues raised in SWBT's Second Amended Answer. See MDRD Sept. 9<sup>th</sup> Letter Ruling at 2.

7. Although we find Premiere's arguments concerning the record to be unpersuasive, we are persuaded that granting the Motion will conserve the parties' and Commission's resources. As an initial matter, we note that Premiere has expressed some optimism regarding the prospects of this dispute being resolved in the context of other disputed matters between the parties.<sup>23</sup> Further, even without a settlement, Premiere may elect not to file a subsequent complaint proceeding. Indeed, its unwillingness to pursue its complaint at this stage of the proceeding suggests that it is unlikely that Premiere will file a subsequent complaint. Thus, the parties may very well entirely avoid the time and expense associated with briefing this case and challenging the Commission's ultimate decisions, and the Commission may turn its attention to other matters.

8. SWBT disputes the notion that resources will be saved by granting Premiere's Motion and argues that we should either deny Premiere's motion or dismiss the complaint with prejudice. First, SWBT claims that its expenditure of resources to date will have been wasted if we dismiss the complaint without prejudice and leave SWBT exposed to the expenses associated with any potential future litigation brought by Premiere.<sup>24</sup> Second, SWBT argues that, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Premiere's motion to dismiss should automatically be treated as a motion to dismiss with prejudice.<sup>25</sup> According to SWBT, Premiere had voluntarily dismissed a prior proceeding before the Texas PUC that SWBT asserts involved the same claims as those in the instant complaint.<sup>26</sup>

9. We reject both of SWBT's arguments. As to the first argument, although we acknowledge the possibility that Premiere might file a subsequent action, we conclude that this does not constitute the type of plain legal prejudice that warrants a denial of Premiere's request.<sup>27</sup> Courts typically find that the mere prospect of having to defend a second lawsuit is not a sufficient basis to dismiss a complaint with prejudice.<sup>28</sup> Further, we disagree that SWBT's

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<sup>22</sup> Also, we note that at no point during the procedural events that followed SWBT's correction of the record did Premiere suggest that the record was somehow tainted beyond repair. Then, one week before the opening briefs were due, Premiere filed its Motion.

<sup>23</sup> In arguments made during a telephone call on November 21, 2002, Premiere's counsel advised Commission staff and counsel for SWBT that his client had had discussions with SWBT business representatives on other disputed matters, and believed that a resolution of this case could be reached in the context of resolving other issues unrelated to Premiere's formal complaint.

<sup>24</sup> Opposition at 2.

<sup>25</sup> Opposition at 5. SWBT maintains that Premiere's Motion should be considered a voluntary dismissal with prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure, because Premiere's prior withdrawal of a Texas PUC proceeding which involved the same claims would operate under Rule 41(a)(1) "as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States . . . an action based on or including the same claim." *Id.* at 5-6.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> Opposition at 2.

<sup>28</sup> See note 16 *supra*. Courts have considered other prejudice arguments in granting motions to dismiss (e.g., dismissal will prejudice the non-movant, because its ability to defend itself in a subsequent action will be (continued....))

expenditure of resources to date would be wasted if Premiere files a second lawsuit. If Premiere files a second complaint, SWBT will have the benefit of its research into the matters complained of in this proceeding, as well as a clear understanding of Premiere's claims and legal analysis. This should greatly minimize SWBT's costs in having to defend against any future action. In addition, we expect that SWBT will seek to rely on pleadings filed in this proceeding in any subsequent proceeding, and we will reasonably exercise our discretion in such a subsequent proceeding to minimize the burdens on SWBT in responding to the proceeding.<sup>29</sup>

10. Furthermore, to help ensure that any potential prejudice to SWBT associated with having to defend a duplicative second complaint is minimized, we exercise our discretion to impose a condition on Premiere as part of our grant of Premiere's Motion.<sup>30</sup> If Premiere files, within one year of the date of this Order, a formal complaint against SWBT at the Commission that alleges the same or materially similar facts and legal issues as raised in this proceeding, Premiere must include an exhibit to that complaint that compares that complaint with the complaint filed in this proceeding. Such a requirement will help reduce the time and resources required of SWBT to respond to a duplicative complaint.

11. We also reject SWBT's second ground for denial of Premiere's Motion. SWBT argues that, pursuant to Rule 41(a)(1), we should treat Premiere's Motion as a motion to dismiss with prejudice because Premiere had filed and dismissed a related complaint before the Texas Public Utilities Commission ("Texas PUC").<sup>31</sup> SWBT has failed, however, to provide sufficient information regarding the Texas PUC proceeding, including the circumstances of that complaint's dismissal,<sup>32</sup> and whether that proceeding actually involved the same claims made in Premiere's FCC complaint. Thus, we deny SWBT's request that we treat Premiere's Motion as a motion to dismiss with prejudice.

12. For the foregoing reasons, we grant Premiere's Motion to Dismiss its complaint without prejudice. We find that, under the circumstances of this case, dismissing the complaint without prejudice is appropriate and is in the public interest, because it ensures the efficient use of the Commission's formal complaint process, and may eliminate the need for further litigation

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hindered by the loss of evidence, unavailability of witnesses or loss of legal defenses). SWBT, however, makes no such claims here.

<sup>29</sup> We would also expect SWBT to argue in any subsequent complaint proceeding that the statute of limitations severely limits, if not precludes, any attempt by Premiere to recover damages. Although we take no position on future damage claims in this Order, we note that such an argument would merit serious consideration.

<sup>30</sup> See FED. R. CIV. P. 41(a)(2) (providing that courts, in dismissing complaints under this rule, may impose conditions on the movant as a means of being equitable to the defendant).

<sup>31</sup> As stated above, we find that the Federal Rules of Civil Procedure are instructive on issues such as this, but not controlling.

<sup>32</sup> For example, we note that the arbitrators in the Texas PUC proceeding issued an order that instructed the parties to comply with the special request provisions of their interconnection agreement before pursuing the requested relief. Complaint, Exhibit 15 at VI.

and expenditure of additional time and resources of the parties and this Commission.<sup>33</sup>

### III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and section 1.727 of the Commission's rules, 47 C.F.R. § 1.727, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Complainant's Motion to Dismiss the Proceeding Without Prejudice IS GRANTED.

14. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and section 1.727 of the Commission's rules, 47 C.F.R. § 1.727, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Complainant's complaint is hereby dismissed without prejudice, and the above-captioned complaint proceeding IS TERMINATED.

15. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and section 1.727 of the Commission's rules, 47 C.F.R. § 1.727, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that should Premiere Network Services, Inc. file, within one year of the date of this Order, a formal complaint against Southwestern Bell Telephone Co. at the Commission that alleges the same or materially similar facts and legal issues raised in this proceeding, Premiere Network Services, Inc. must include an exhibit to its new complaint that compares it to the complaint filed in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Radhika V. Karmarkar  
Deputy Chief, Market Disputes Resolution Division  
Enforcement Bureau

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<sup>33</sup> Although Premiere suggests in its Motion that, rather than dismiss its complaint, we convert it into an informal complaint, it provides no explanation for why such a conversion is preferable to a dismissal, and we therefore decline to do so.